

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
BILL J. MACE)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NUMBER WPC07-0215
)	

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

II.

Bill J. Mace (hereinafter "the Respondent") is a resident of the state of Kentucky and is the developer of Liberty Park, a residential subdivision located on S.R. 76 in Montgomery County (hereinafter "the site"). Service of process may be made on the Respondent at 101 Mace Lane, Oak Grove, Kentucky 42262.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI) a site specific Storm Water Pollution Prevention Plan (SWPPP) and appropriate fee.

VI.

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

The unnamed tributary to Raccoon Branch and an unnamed wetland, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife. Additionally, Raccoon Creek and its unnamed tributary are listed as impaired for loss of biological integrity due to siltation.

FACTS

VIII.

On March 20, 2006, the Respondent submitted an NOI, SWPPP, and appropriate fee requesting TNCGP coverage for construction activities at the site. Also on March 20, 2006, the Respondent submitted an ARAP application package requesting written authorization from the division for the construction of three minor road crossings and one utility line crossing of the

unnamed tributary to Raccoon Creek. The SWPPP was determined to be deficient and indicated stream alterations that were not addressed in the ARAP application packages. These deficiencies were addressed by the Respondent and the division issued a Notice of Coverage (NOC) for the construction activities and written authorization for the ARAP activities on June 26, 2006.

IX.

On May 21, 2007, division personnel from the Nashville Environmental Field Office (NEFO) conducted a complaint investigation at the site and noted that inadequate Erosion Prevention and Sediment Control (EPSC) measures had allowed eroded material to migrate into the unnamed tributary to Raccoon Creek. Two basins had been improperly constructed and were not retaining sediment on site. Division personnel also noted that EPSC at the road crossings and utility line crossing were inadequate and were allowing eroded material to migrate into the unnamed tributary to Raccoon Creek. Heavy equipment tracks were present in the tributary channel at the crossing locations. Construction activities in the Mutual Drive area of the site had resulted in the impoundment of the unnamed tributary, sediment loss into an adjacent jurisdictional wetland, and the blocking of the stream flow into the wetland. The NOC, SWPPP, and EPSC inspection reports were not available on site as required by the TNCGP.

X.

On June 13, 2007, the division issued and Notice of Violation (NOV) to the Respondent for the violations noted during the May 21, 2007, complaint investigation. The Respondent was instructed to immediately implement effective EPSC measures, insure that those measures were repaired or replaced within seven days after the need for repair or replacement was identified, and within 7 days of receipt of the NOV, submit an amended SWPPP to the division.

XI.

On September 24, 2007, division personnel conducted a site inspection to determine compliance with the items requested in the June 13, 2007, NOV. Division personnel noted that attempts had been made to install effective EPSC measures but, these measures were still inadequate and in need of repair. EPSC measures at the road crossings and utility line crossing were inadequate, and the unnamed tributary at the Mutual Drive area was still blocked. Eroded material continued to migrate into the unnamed tributary.

XII.

To date, the division has not received a response to the June 13, 2007, NOV.

XIII.

During the course of investigation, the division incurred DAMAGES in the amount of FIVE HUNDRED ELEVEN DOLLARS AND THIRTY CENTS (\$511.30).

VIOLATIONS

XIV.

By failing to comply with the terms and conditions of an existing ARAP and by failing to comply with the terms and conditions of the TNCGP, the Respondent has violated T.C.A. §§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XV.

By causing a condition of pollution to unnamed tributary to Raccoon Branch and the unnamed wetland, the Respondent has violated T.C.A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVI.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent.

1. The Respondent shall, within 7 days of receipt of this ORDER, establish and maintain effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.
2. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
3. The Respondent shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the NEFO at 711 R.S. Gass

Boulevard Nashville, Tennessee 37243, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

4. The Respondent shall, within 60 days of receipt of this ORDER, submit to the division a corrective action plan (CAP) to remove the accumulated sediment from and restore the affected segments of Raccoon Branch to their original condition and restore flow the unnamed wetland. The CAP shall be prepared by a licensed professional engineer, landscape architect, or other competent professional and shall include a timetable for implementation of the actions proposed in the CAP. The Respondent shall submit the CAP to the NEFO for review and approval and a copy of the CAP to the E&C Section, at the respective addresses shown in item 3, above. The Respondent must correct any deficiencies the division finds upon review of the CAP and the corrected CAP should be resubmitted to the division within 30 days of notification of the deficiencies.
5. The Respondent shall, within 30 days of receipt of written approval of the CAP, initiate the approved actions. The written approval of the CAP by the division will constitute authorization for sediment removal and stream restoration and no additional ARAP coverage is required. The Respondent shall submit written notification to the division that work has begun at the time the Respondent initiates the CAP. The Respondent shall submit the written notification to the NEFO and a copy of the written notification to the E&C Section, at the respective addresses shown in item 3, above.
6. The Respondent shall, within 90 days of initiating the approved CAP, but not later than March 31, 2008, complete the CAP and submit written notification of completion to the

division. The Respondent shall submit the written notification to the NEFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 3, above.

7. The Respondent shall pay DAMAGES to the division in amount of FIVE HUNDRED ELEVEN DOLLARS AND THIRTY CENTS (\$511.30).
8. The Respondent shall pay a CIVIL PENALTY of THIRTY THREE THOUSAND FIVE HUNDRED DOLLARS (\$33,500.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondent shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00).
 - b. If the Respondent fails to comply with Part XVI, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - c. If the Respondent fails to comply with Part XVI, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - d. If the Respondent fails to comply with Part XVI, item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - e. If the Respondent fails to comply with Part XVI, item 4 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00), payable within 30 days of default.


- f. If the Respondent fails to comply with Part XVI, item 5 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00), payable within 30 days of default.
- g. If the Respondent fails to comply with Part XVI, item 6 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00), payable within 30 days of default.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 19th day of October 2007.


Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform

Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.